Supreme Court of Kansas.

THE STATE *v.* MARTIN RUTH.

To constitute rape it is not essential that the female shall make the utmost physical resistance of which she is capable. If, in consequence of threats and display of force, she submits through fear of death or great personal injury, the crime is complete.

A certificate of an officer charged with the custody of public records that his records show a certain fact, is not, in the absence of express statute, competent evidence of the fact. There should be a certified copy of the records that the court may see whether the records prove the fact.

A defect in the verification of an information is waived by pleading to the merits and going to trial.

By statute Ness county was attached to Pawnee county for judicial purposes until it should be organized. The law in reference to the organization of new counties provided, that after certain proceedings had been taken, the governor should appoint commissioners and clerks, and that the county should be organized from and after the qualification of these officers. On the trial of a party in the Pawnee County District Court, charged with the commission of an offence in Ness county, it was objected that the District Court of Pawnee county had no jurisdiction because of the place of the offence. No evidence was offered as to the organization of Ness county, and the District Court overruled the objection: *Held*, no error.

THE defendant was convicted in the District Court of Pawnee county, of rape, and thereupon brought his appeal.

H. B. Johnson, *Willard Davis* and *N. B. Freeland*, for the state.

Nelson Adams, for defendant.

The opinion of the court was delivered by

BREWER, J.—Several questions are presented in the record. It is alleged that the information was insufficient for lack of a proper verification; the verification was defective, but the defect was waived by the defendant's pleading to the merits and going to trial: *State* v. *Otey*, 7 Kans. 69.

The jurisdiction of the court was challenged. The prosecution was in the District Court of Pawnee county, and the offence charged to have been committed in Ness county. By sect. 2, chap. 67, Laws 1874, the county of Ness was until organized attached to Pawnee county for judicial purposes. On the trial, a certificate of the secretary of state was offered for the purposes of showing that Ness county had been duly organized, but the District Court rejected

the testimony. We see no error in this ruling, for the certificate was simply a statement that the records of his office showed certain facts, as "that Ness county was duly organized by proclamation of the governor on the 23d day of October 1873," and did not purport to furnish copies of any paper or record. The paper was a certificate of a fact and not a certified copy of any paper of record. And that such a certificate is not in the absence of express direction of statute, competent evidence is clear: *Bemis* v. *Becker*, 1 Kans. 226; *Owen* v. *Boyle*, 3 Shepl. 147; *English* v. *Sprague*, 33 Me. 440; 1 Greenl. on Ev., sect. 498, and cases cited in note.

Will the court, in the absence of evidence, take judicial notice of the date of the organization of new counties? Doubtless the court takes judicial notice of the fact that in the eastern portion of the state there are counties duly organized, and with all the machinery of the law and courts in full operation, and that the western portion is composed of unorganized territory, but whether it will take notice of the time when any particular county passes from an unorganized to an organized condition is doubtful. Such passage dates not from any proclamation from the governor or from any action of the executive, but "from and after the qualification of the officers appointed" by the governor: Laws 1872, p. 244, sect. 1; Laws 1875, p. 244, sect. 1.

And it can hardly be that the court is to take judicial notice of the times at which certain officers appointed in a county hitherto unorganized take the oath of office and give their official bond. It would seem that this is a question of fact and a subject-matter of proof. Doubtless, when a District Court is held in a county, it will be presumed by this court that the county is so organized as to afford officers and other machinery for the holding of court, and that the action of the district judge in thus holding court is warranted by the facts as he has found them to exist, and this presumption can only be overthrown by evidence proving the contrary. It is not necessary in each case to prove that the county has in fact been organized. Is not the converse of this proposition equally correct? The question now before us is not whether this court, in an original action, is to take judicial notice of the fact that a county is regularly organized and courts held therein, but whether, when the District Court is not held in such county, and the court of an adjoining county, to which, by express statute, the county is attached for judicial purposes, declines to recognise such county as

organized, and continues to exercise the jurisdiction it unquestionably once held, this court shall, in proceedings in error, take judicial notice of the fact that the officers had duly qualified, the county become regularly organized, and that the District Court erred in not so recognising the fact and holding terms of court therein. See the case of *Wood* v. *Bartling*, 16 Kans. 109, on this question.

But is it true that the legislature has no power to attach one organized county to another for judicial purposes? The constitution provides, sect. 5, art. 3, that, "The state shall be divided into five judicial districts," and in section 18, same article, names the counties of which such districts were at first to consist. It also provided by said sect. 5 that the "District Courts should be held at such times and places as may be provided by law." It does not say that they shall be held in each county, and though, by sect. 7, a clerk of the District Court is to be elected in each organized county, is there any inhibition on the legislatures providing that the District Court in each district be held at only one place in the district. Again the number of districts may be increased by law, but it requires the concurrence of two-thirds of the members of each House: sect. 14; and "*new or unorganized* counties shall, by law, be attached for judicial purposes to the most convenient judicial districts: sect. 19. Now, under that, may not the legislature attach a new though organized county for judicial purposes to any convenient district or to any county in that district? Such certainly was the understanding of the legislature in the early history of the state. For the first state legislature attached Clay, Dickinson, Saline and Ottawa counties to the county of Davis; the counties of Washington, Republic and Shirley to the county of Marshall, and so on. See Laws 1861, page 123, sect. 1. Some of these counties so attached were named in the constitution as named in the five districts, and others were organized intermediate the sitting the constitutional convention and the admission of the state. That such contingencies as the creation and organization of new counties was foreseen and provided for, the constitution itself discloses, and the power to provide for the administration of justice in them, without creating new districts, was expressly granted. And the Bill of Rights, as foreseeing the very question here presented, guarantees to an accused "a speedy public trial by an impartial jury of the county or district in which the offence is alleged to have been committed:" Bill of Rights, sect. 10. But it is, perhaps, un-

necessary to pursue this inquiry further. It does not seem to us that this court can hold that the District Court erred in exercising jurisdiction of the case.

The law of the case was fairly presented by the charge of the court. The court declared that the force necessary to constitute the crime of rape might be mental or physical force, or both combined, and that if a person by threats or by placing a female in fear of death, violence or bodily harm, induces her to submit to his desires, and while under this influence, ravishes her, this is as much a forcible ravishing as if a person by reason of his superior strength would hold a woman and forcibly ravish her. We understand the court to simply mean that the act must be committed, either (1) by physical force against the will of the female, or (2) with her acquiescence procured by threats or violence. On the contrary, the court was asked to declare that the offence charged could not be committed unless there was the utmost reluctance and the utmost resistance on the part of the female. The distinction between the two theories is broad and well defined. Under the former, acquiescence induced by mental terror and fear of violence, supersedes the necessity of physical resistance. Under the latter there must be actual physical resistance; the female, when assailed, must persist, though she knows resistance will be vain; she must fight, though she may believe this course will bring upon her other and greater violence; she must cry aloud, though she knows no relief is near; she must arouse her sleeping infant sisters to be witnesses to the outrage, though she knows they can render her no aid. Under the former, the force may be either actual or constructive, while under the latter, it must be actual. The weight of reason and authority is with the view of the court below: *Turner* v. *People*, 33 Mich. 363; *Commonwealth* v. *McDonald*, 110 Mass. 405; *Wright* v. *State*, 4 Humph. (Tenn.) 194; *People* v. *Duhring*, 59 N. Y. 374; *Regina* v. *Camplin*, 1 Cox C. C. 220; Roscoe's Cr. Ev., 6th Am. ed., 806; 1 East P. C. 97, 444.

In Roscoe's Cr. Ev., *supra*, it is said, "It must appear that the offence was committed without the consent of the woman; but it is no excuse that she yielded at last to the violence, if her consent was forced from her by fear of death or by duress." In 2 Bishop's Criminal Law, sect. 1120, the author says, "Yet wherever there is a carnal connection, without anything which can be deemed a consent, where there is neither a consent fraudulently procured, nor

any other sort of consent by the woman, there is evidently in the wrongful act itself, all the force which the law demands as an element of the crime." And again, in sect. 1125, "A consent induced by fear of personal violence is no consent, and though a man lays no hand on a woman, yet if by an array of physical force he so overpowers her mind that she dares not resist, he is guilty of rape, by having the unlawful intercourse." See also 2 Whart. Am. Cr. Law, sect. 1142; *Pleasants* v. *The State*, 8 Eng. (Ark.) 360; see also *State v. Shields*, 45 Conn. 258, where it was *held*, that a refusal of the court to charge that to constitute the crime of rape, it was necessary that the female should have manifested the utmost reluctance, and should have made the utmost resistance, was not error. The importance of resistance is simply to show two elements in the crime; forcible carnal knowledge by the one party, and non-consent by the other. The jury must be satisfied of the existence of these two elements by the resistance of the complainant, if she had the use of her faculties and physical powers at the time, and was not prevented by terror or the exhibition of brutal force. So far her resistance is important, but to make the crime hinge on the uttermost exertion the woman was physically capable of making, would be a reproach to the law and to common sense. The question is one of fact, and a jury must determine it.

As to the questions of fact we cannot say that the jury erred, or that the verdict was against the evidence. The case substantially hinged on the relative credibility of the prosecuting witness and the defendant. He admitted the intercourse, but claimed that it was voluntary on her part; she testified that there was a forcible ravishing. The corroborating testimony which, however, was limited, tended to support the prosecuting witness. The jury believed her story, and the trial judge approved their verdict. We cannot say that it was wrong, and the judgment must be affirmed.